

STATE OF MICHIGAN
COURT OF APPEALS

THERESA THORNTON,

Plaintiff-Appellant,

v

WEBASTO CORPORATION, CHRISTOPHER
YORK, and GERALD SCHAEFER,

Defendants-Appellees.

UNPUBLISHED
February 13, 2007

No. 271493
Oakland Circuit Court
LC No. 04-060226

Before: Cavanagh, P.J., and Murphy and Meter, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10) in this employment action in which plaintiff alleged claims of age discrimination and retaliation in violation of the Elliott-Larsen Civil Rights Act (CRA), MCL 37.2101 *et seq.* We affirm.

Plaintiff was terminated from her employment with defendant Webasto following numerous disciplinary actions taken against her for misconduct, including failure to punch out, leaving work early, and production of defective parts.¹ Individual defendants York and Schaefer supervised plaintiff at various times during her employment. Plaintiff alleged that the disciplinary measures she incurred were the result of age discrimination and retaliation. The trial court found that plaintiff failed to establish, by way of documentary evidence, a genuine issue of material fact relative to the two causes of action.² On appeal, plaintiff presents argument

¹ We note that plaintiff was 55 years old when she was hired in 2000.

² MCR 2.116(C)(10) provides for summary disposition where there is no genuine issue regarding any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law. A trial court may grant a motion for summary disposition under MCR 2.116(C)(10) if the pleadings, affidavits, and other documentary evidence, when viewed in a light most favorable to the nonmovant, show that there is no genuine issue with respect to any material fact. *Quinto v Cross & Peters Co*, 451 Mich 358, 362; 547 NW2d 314 (1996), citing MCR 2.116(G)(5). Initially, the moving party has the burden of supporting its position with documentary evidence, and, if so supported, the burden then shifts to the opposing party to establish the existence of a
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challenging only the dismissal of the age discrimination claim; therefore, dismissal of the retaliation action remains intact and will not be addressed.

The CRA provides, in part, that “[a]n employer shall not . . . discharge . . . or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of . . . age[.]” MCL 37.2202(1)(a). A plaintiff may use either direct or indirect evidence to establish a case of unlawful age discrimination. *DeBrow v Century 21 Great Lakes, Inc (After Remand)*, 463 Mich 534, 539; 620 NW2d 836 (2001); *Town v Michigan Bell Telephone Co*, 455 Mich 688, 694-695; 568 NW2d 64 (1997). Here, plaintiff relies on indirect or circumstantial evidence, arguing that other employees who were younger than her were not terminated despite accruing comparable disciplinary marks on their employment records. In cases that involve indirect or circumstantial evidence, a plaintiff must proceed by using the burden-shifting approach utilized in *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973). *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 133-134; 666 NW2d 186 (2003). Under this approach, the plaintiff is permitted to present a rebuttable prima facie case of discrimination on the basis of evidence from which a trier of fact could infer that the plaintiff was the victim of unlawful discrimination. *Id.* at 134.

To establish a rebuttable prima facie case of discrimination under the CRA, a plaintiff must prove, by a preponderance of the evidence, that (1) she belongs to or is a member of a protected class, (2) she suffered an adverse employment action, (3) she was qualified for the position, and that (4) she suffered an adverse employment action, such as discharge, under circumstances giving rise to an inference of unlawful discrimination. *Sniecinski, supra* at 134; *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998). The fourth element can be shown by evidence that other employees, similarly situated and outside the protected class, were not subject to the employer’s adverse conduct. *Town, supra* at 695; *Lytle, supra* at 177.

“Once a plaintiff has presented a prima facie case of discrimination, the burden then shifts to the defendant to articulate a legitimate, nondiscriminatory reason for the adverse employment action.” *Sniecinski, supra* at 134. When a defendant produces evidence of a legitimate, nondiscriminatory basis in support of the adverse employment action, the burden shifts back to the plaintiff to show that the reasons proffered by the defendant were not true, but

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genuine issue of disputed fact. *Quinto, supra* at 362; see also MCR 2.116(G)(3) and (4). “Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in [the] pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists.” *Quinto, supra* at 362. Where the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the motion is properly granted. *Id.* at 363. “A genuine issue of material fact exists when the record, giving the benefit of reasonable doubt to the opposing party, leaves open an issue upon which reasonable minds might differ.” *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). A court may only consider substantively admissible evidence actually proffered relative to a motion for summary disposition under MCR 2.116(C)(10). *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999).

were merely a pretext for discrimination. *Id.* The Supreme Court in *Lytle, supra* at 175-176, explained the analysis, in the context of summary disposition, that follows once the defendant offers a legitimate, nondiscriminatory reason for the adverse employment action:

[D]isproof of an employer's articulated reason for an adverse employment decision defeats summary disposition only if such disproof also raises a triable issue that discriminatory animus was a motivating factor underlying the employer's adverse action. In other words, plaintiff must not merely raise a triable issue that the employer's proffered reason was pretextual, but that it was a pretext for age or sex discrimination. Therefore, we find that, in the context of summary disposition, a plaintiff must prove discrimination with admissible evidence, either direct or circumstantial, sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff.

The evidence submitted by a plaintiff in establishing his or her prima facie case of discrimination may also be considered in determining whether the defendant's legitimate, nondiscriminatory reason for the adverse action was merely a pretext. *Id.* at 178. In proving that the reasons provided by a defendant were pretextual and that age was a determining factor, a plaintiff can attempt to show that he or she was treated differently than similarly situated employees. *Id.*

Here, assuming that plaintiff established a rebuttable prima facie case of age discrimination under the CRA, defendants submitted documentary evidence of a legitimate, nondiscriminatory reason for her termination. Under defendant Webasto's policies and procedures, there are three different disciplinary tracks or classes of work rule violations, including "general work rule" violations, and termination results for five violations of the general work rules as long as the violations occurred within certain time frames established by the company. Plaintiff violated the general work rules on numerous occasions, with the pertinent fifth violation, production of defective parts, resulting in plaintiff's termination. Plaintiff was disciplined in accordance with defendant Webasto's policies and procedures. While plaintiff argues the legitimacy of some of the disciplinary actions taken against her, the documentary evidence established, and reasonable minds would agree, that plaintiff was deserving of the five work rule violations that she incurred. Thus, the question becomes whether plaintiff submitted sufficient evidence to create a triable factual issue regarding whether the work rule violations and termination were a mere pretext for age discrimination.

We first note the existence of a problem with the lower court record. The exhibits that were apparently attached to the parties' respective briefs on summary disposition are not included in the record that was conveyed to this Court. Indeed, plaintiff's brief in response to the motion for summary disposition is not even included in the record, nor noted in the lower court docket entries. However, the transcript of the hearing on the motion evidences that the court had in front of it the briefs and the exhibits submitted by both parties. Consistent with Administrative Order No. 2004-5, defendants attached a copy of their exhibits to their appellate brief; however, plaintiff, while attaching a copy of her summary disposition brief to her appellate brief, failed to attach a copy of her exhibits in violation of AO 2004-5. This Court made an unsuccessful inquiry to the trial court regarding whether the missing documents could be located. This Court also inquired of counsel for both parties regarding whether copies of plaintiff's exhibits could be

provided, but no exhibits were forthcoming. Plaintiff's counsel apparently indicated that defendants did not have copies of the exhibits and that the trial court lost the exhibits. Plaintiff includes in her appellate brief a chart regarding younger employees who were supposedly not terminated for similar infractions, which chart references exhibits that purportedly support the information contained therein. Considering that the trial court clearly reflected on the exhibits, we shall make the assumption that the chart cited by plaintiff was supported by documentary evidence. However, even with this assumption, summary disposition was proper.

The information in the chart does not establish that plaintiff and the employees listed in the chart were similarly situated. The charted information does not indicate the work rule classification within which the violation fell, which has a bearing on the discipline that is meted out to the employee, and the chart does not indicate the supervisors involved in the discipline. Plaintiff complains of age discrimination by the individual defendants, but there is no indication that these defendants were involved in the disciplining of the employees listed in the chart. Moreover, defendants submitted documentary evidence showing that some of the listed employees were on different disciplinary tracks or a combination of disciplinary tracks, that some of the listed employees have been terminated, and that numerous other younger employees were terminated during plaintiff's employment. Plaintiff has failed to establish a factual issue regarding whether defendants' legitimate, nondiscriminatory reason for adverse action was merely a pretext for illegal age discrimination.

Affirmed.

/s/ Mark J. Cavanagh
/s/ William B. Murphy
/s/ Patrick M. Meter